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No. 88-1243

In the Supreme Court of the United States

OCTOBER TERM, 1988

IN RE GRAND JURY PROCEEDINGS, COMPANY X,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in applying the crime-fraud exception to the attorney-client and work product privileges that petitioner invoked in refusing to produce documents subpoenaed by a grand jury.

2. Whether the court of appeals erred in not requiring the district court to conduct an in camera review of subpoenaed documents before compelling their production under the crime-fraud exception to the attorney-client and work product privileges.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 857 F.2d 710. The memorandum order of the district court (Pet. 7a-13a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1988. A petition for rehearing was denied on December 20, 1988 (Pet. App. 14a-15a). The petition for a writ of certiorari was filed on January 27, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is the subject of a criminal investigation initiated more than two years ago by a federal grand

jury sitting in the District of Kansas. The grand jury is investigating possible violations of federal criminal law, including conspiracy, 18 U.S.C. 371, mail and wire fraud, 18 U.S.C. 1341 and 1343, obstruction of justice, 18 U.S.C. 1503 and 1505, false declarations before the grand jury, 18 U.S.C. 1623, and racketeering, 18 U.S.C. 1962. The investigation relates to the promotion, marketing, and sale of a product manufactured and sold by petitioner in the early 1970s, together with petitioner's conduct in connection with the resulting product liability litigation brought by consumers in state and federal courts. Pet. App. 2a, 7a-8a.

On November 3, 1986, and March 12, 1987, a total of four grand jury subpoenas were served on petitioner and Law Firm Y, which had represented petitioner in the nationwide product liability litigation. The subpoenas called for specific documents relating to criminal allegations that the grand jury was investigating. On separate appearances before the grand jury in March, April, and May 1987, petitioner and Law Firm Y, through representatives, asserted the attorney-client and work product privileges for substantial numbers of the subpoenaed documents and refused to produce them. Pet. App. 8a; Gov't C.A. Br. 2-4.

In May 1987, the government filed in the district court a motion to compel production of all responsive documents from both petitioner and Law Firm Y on the ground that the crime-fraud exception vitiated any possible claim of attorney-client or work product privilege. In support of that motion, the government submitted under seal testimony and exhibits received by the grand jury, and the declaration of the Department of Justice attorney overseeing the grand jury's investigation. The prosecutor's declaration represented that the evidence adduced before

the grand jury showed that petitioner had been engaged in ongoing criminal and fraudulent activity for roughly 15 years and had used its attorneys to further and cover up those illegal activities in the nationwide product liability litigation. See Pet. App. 2a, 9a; Gov't C.A. Br. 5, 15.

2. After a hearing, the district court on August 17, 1987, granted the government's motion to compel (Pet. App. 7a-13a). The court recognized that the attorney-client and work product privileges do not apply " 'where the client consults an attorney to further a crime or fraud' " (*id.* at 9a (quoting *In re Grand Jury Proceedings (Vargas)*, 723 F.2d 1461, 1467 (10th Cir. 1983), cert. denied, 469 U.S. 819 (1984)), and thus the "threshold inquiry is whether the client consulted the attorney in order to aid in the commission or planning of a crime or tort" (Pet. App. 9a). Having reviewed the government's evidentiary submission,[1] the court found (*id.* at 11a (brackets in original)) that

> [t]he *in camera* submissions contain a strong *prima facie* showing that [Company X] and its employees and officers participated in the commission of crimes and fraud during the promotion, marketing and sale of [the Product], and used its attorneys to perpetuate and cover up these ongoing crimes and fraud during the ensuing product liability litigation through the commission of frauds on the court, obstruction of justice and perjury.

The court similarly found that "[t]hese [criminal] acts * * * occurring during the period of representation by [Law Firm Y], and the documents sought by the subpoenas are related to that activity" (*id.* at 10a).

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[1] The court found that the prosecutor's affidavit "appears to be an accurate representation and account of the grand jury proceedings" (Pet. App. 8a).

Based on those factual findings, the court concluded that petitioner was "not entitled to assert the work product or attorney-client privilege to prevent production of documents responsive to the subpoenas * * * as a result of the crime-fraud exception to these privileges" (Pet. App. 11a). The court reiterated that the record contained a prima facie showing that petitioner used its attorneys to further its criminal activity, and that the documents sought were part of that activity (*id.* at 11a-12a).

Finally, the court concluded that, under the circumstances, there was no need for the court itself to examine the subpoenaed documents. The court found that those documents "bear a reasonable relationship to the crimes and frauds described in the *in camera* declaration, and [thus] there is no necessity * * * to conduct an examination * * * for that purpose" (Pet. App. 12a). Accordingly, the court ordered petitioner and Law Firm Y to comply with the grand jury subpoenas promptly.[2] The district court, however, stayed its order compelling compliance pending petitioner's appeal to the Tenth Circuit (*id.* at 3a n.4).

3. On September 16, 1988, the court of appeals unanimously affirmed, concluding that the district court had correctly applied the crime-fraud exception to the privileges petitioner had invoked. The court of appeals noted that the district court had found that "the government made a *prima facie* showing that [petitioner] through its employees committed crimes and then used Law Firm Y to cover up and perpetuate those crimes through the commission of a second series of crimes and frauds" (Pet.

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[2] The district court prepared and filed under seal a summary of the evidence that supported its factual findings. Sealed Findings, *In re Grand Jury Proceedings: [Company X, Law Firm Y]*, No. 87-10069A (D. Kan. Aug. 17, 1987) (Doc. 57); see Pet. App. 12a.

App. 4a (footnote ommitted)).[3] The court of appeals recognized the well-settled principle that "[t]he attorney-client privilege does not apply where the client consults an attorney to further a crime or fraud" (*ibid.* (citing *Clark* v. *United States*, 289 U.S. 1 (1933)). Based on the record, which "amply supported" the district court's findings that petitioner had consulted its attorneys for precisely that purpose, the court of appeals held that petitioner could not properly claim privileges in the subpoenaed documents (Pet. App. 4a).

Petitioner contended before the court of appeals that the district court erred in applying the crime-fraud exception because it failed to make the required finding that "the purpose of the subpoenaed communications was to further a crime or fraud" (Pet. App. 5a). The court of appeals accepted petitioner's characterization of the finding required to satisfy the crime-fraud exception, but it disagreed with petitioner's "interpretation of the district court's * * * order" (*ibid.*), because in the court of appeals' view, the district court had determined that "the purpose of the communication[s] was to further crime or an intended fraud" (*id.* at 6a).

The court of appeals also rejected petitioner's contention that the district court erred in not reviewing in camera all of the subpoenaed documents. Relying on prior precedent, the court concluded that the district court had not abused its discretion where, as here, "the scope of the sub-

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[3] The court of appeals initially held that the district court's order was appealable under the exception to the final order rule that the Court recognized in *Perlman* v. *United States*, 247 U.S. 7 (1918) (Pet. App. 3a-4a (citing fact that Law Firm Y is willing to comply with district court's order, thus rendering petitioner unable to protect its asserted privilege in those documents)). But see *In re Oberkoetter*, 612 F.2d 15 (1st Cir. 1980); *National Super Spuds, Inc.* v. *New York Mercantile Exch.*, 591 F.2d 174 (2d Cir. 1979) (Friendly, J.).

poenas and the *prima facie* evidence of attorney involvement in the alleged crime and fraud satisfy us that the documents subpoenaed fall within the exception to the attorney-client privilege and [thus] need not be individually examined" (Pet. App. 6a (citing *In re Grand Jury Proceedings (Vargas)*, 723 F.2d at 1467)).

4. On December 20, 1988, the court of appeals denied the petition for rehearing and suggestion for rehearing en banc, and ordered its mandate to issue forthwith (Pet. App. 14a-15a). The district court, however, subsequently granted petitioner's request to stay its order compelling production pending the filing of a petition for a writ of certiorari (A-601 App. B1).[4] The government thereafter filed in the court of appeals a motion to recall and clarify the mandate. After receiving petitioner's response, the court of appeals on January 26, 1989, recalled its mandate, ordered the district court to vacate any stays in effect, and reissued its mandate forthwith (Pet. App. 16a). That same day, the district court entered an order authorizing the grand jury to obtain access to the subpoenaed documents (A-601 App. B2). Petitioner then filed an application for a stay of the district court's order together with its petition for a writ of certiorari. On February 3, 1989, Justice White, sitting as Circuit Justice, denied the application for a stay.

ARGUMENT

Despite petitioner's broad assertions to the contrary (Pet. 7-13), the court of appeals' decision does not conflict with any decision of this Court or of any other court of appeals concerning the application of the crime-fraud exception to the attorney-client and work product privileges. At

[4] "A-601 App." refers to the appendix filed with petitioner's application for stay in this Court (No. A-601).

bottom, petitioner challenges the lower courts' application of settled legal principles to the record facts. Those fact-specific claims do not merit further review by this Court.

1. Petitioner contends (Pet. 7-10) that the court of appeals' treatment of the crime-fraud exception conflicts with decisions of the Second, Fifth, Sixth, and Eighth Circuits. Petitioner's asserted conflict, however, stems from a misreading of each of those decisions. This Court concluded long ago that when a client consults an attorney for advice in carrying on a contemplated or ongoing crime or fraud, the communication is not privileged. *Clark* v. *United States*, 289 U.S. 1, 15-16 (1933); see generally 2 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 503(d)(1)[01] (1988). In the words of the *Clark* Court, 289 U.S. at 15, "[t]he privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told." The rationale of that principle is clear: "advice in furtherance of such goals is socially perverse, and the client's communications seeking such advice are not worthy of protection." *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1038 (2d Cir. 1984).

Although using different verbal formulations, the courts of appeals have agreed on the appropriate standard, namely, that the relevant inquiry is whether "the [client's] communications with counsel were intended in some way to facilitate or to conceal the criminal activity." *In re Grand Jury Subpoenas Duces Tecum*, 798 F.2d 32, 34 (2d Cir. 1986); see, *e.g.*, *In re Burlington Northern, Inc.*, 822 F.2d 518, 525 (5th Cir. 1987) (materials generated in the course of other, legitimate litigation activities are protected: "The focus must be narrowed to the specific purpose of the particular communication or docu-

ment. To the extent the document deals with a protected activity, it is immune from discovery."), cert. denied, No. 87-705 (Jan. 11, 1988); *In re Antitrust Grand Jury*, 805 F.2d 155, 168 (6th Cir. 1986) ("the communication must have been made with an intent to further the crime"); *Pritchard-Keang Nam Corp.* v. *Jaworski*, 751 F.2d 277, 281 (8th Cir. 1984) ("attorney-client communications lose their privileged character when the attorney is consulted to further a continuing or contemplated criminal or fraudulent scheme" (internal quotation marks and citation omitted)), cert. dismissed, 472 U.S. 1022 (1985). Here, the court of appeals applied that accepted standard, expressly holding that the crime-fraud exception applies only where "the purpose of the communication was to further crime or an intended fraud" (Pet. App. 6a).

Contrary to petitioner's suggestion, this was not a case in which Law Firm Y represented petitioner in some matters that were not infected by petitioner's fraudulent intent, and in which the attorney-client and work product privileges would protect documents made in connection with those legitimate matters. Compare *In re Burlington Northern, Inc.*, 822 F.2d at 525. Nor was this a case in which the communications simply "related to" a crime or fraud, without the requisite intent to use the attorney-client relationship for improper purposes. Compare *In re Antitrust Grand Jury*, 805 F.2d at 168. Nor was this a case in which the evidence before the district court merely showed that the client and the attorney communicated during a period in which the client was engaged in a criminal or fraudulent activity. Compare *In re Grand Jury Subpoenas Duces Tecum*, 798 F.2d at 34. Rather, as the district court and the court of appeals noted, this was a case in which the client used the law firm to engage in criminal or fraudulent activity; the subpoenaed com-

munications and documents generated as a direct consequence of that illicit purpose were therefore unprotected under the standard applied by the Tenth Circuit in this case and by each of the court of appeals' decisions on which petitioner relies.

At bottom, petitioner challenges the court of appeals' assessment of the record, asserting that the court effectively ordered disclosure of privileged documents without first finding that those documents had been created for an unlawful purpose. See Pet. i, 8. But that is precisely what both the district court and court of appeals found after reviewing the extensive submissions provided by the government.[5] The district court made clear (Pet. App. 11a (brackets in original)) that

> [t]he *in camera* submissions contain a strong *prima facie* showing that [Company X] and its employees and officers participated in the commission of crimes and fraud during the promotion, marketing and sale of [the Product], and used its attorneys to perpetuate and cover up these ongoing crimes and fraud during the ensuing product liability litigation through the commission of frauds on the court, obstruction of justice and perjury.

The court of appeals, after reviewing the record itself, concluded that the district court's findings were "amply

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[5] Petitioner also criticizes the courts below for "fail[ing] to differentiate between documents created to further a crime or fraud and those intended for the legitimate defense of past acts" (Pet. 8). In fact, both the district court and the court of appeals clearly drew and applied that distinction. See Pet. App. 9a ("Obviously, the privilege is not destroyed when a client seeks advice about a *past* crime or fraud." (emphasis in original)); *id.* at 4a n.6 ("The trial court properly distinguished between a party who seeks advice from an attorney concerning *past* crime or fraud and a party who consults an attorney to *further* a crime or fraud." (emphasis in original)).

supported" (Pet. App. 4a). Petitioner presents nothing to suggest that the lower courts' factual findings were not supported by the record, let alone clearly erroneous. Indeed, as the district court observed, "other courts examining part of the same evidence as that presented to the grand jury and described in the *in camera* declaration have found that the crime-fraud exception precluded claims of attorney-client privilege and work product by [Company X]" *id.* at 10a (brackets in original)); see *id.* at 10a-11a (citing court opinions).

It is well settled that this Court ordinarily does not review district court findings of fact that have not been disturbed on appeal. See, *e.g.*, *Goodman* v. *Lukens Steel Co.*, No. 86-1626 (June 19, 1987), slip op. 7-8; *United States* v. *Doe*, 465 U.S. 605, 614 (1984); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967). Thus, petitioner's disagreement with the lower courts' reading of the record does not call for this Court's review.

2. Petitioner further contends (Pet. 10-13) that the court of appeals' failure to require the district court to conduct an in camera review of the subpoenaed documents conflicts with *In re Antitrust Grand Jury*, 805 F.2d 155, 168 (6th Cir. 1986), and *In re Sealed Case*, 754 F.2d 395, 403 (D.C. Cir. 1985). To be sure, those decisions and others have endorsed using such a procedure to resolve privilege disputes and to ensure that privileged documents are not improperly disclosed. See, *e.g.*, *Pritchard-Keang Nam Corp.* v. *Jaworski*, 751 F.2d at 280; *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d at 1036-1039; *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798, 800 (3d Cir. 1979). Contrary to petitioner's suggestion, however, none of those decisions has held that the district court *must* conduct an in camera inspection under all circumstances, especially where it is clear on the face of the record that all of the subpoenaed documents fall within the crime-fraud

exception. Similarly, no court has expressly rejected the procedure followed here, where the district court chose to rely on an independent detailed evidentiary submission that established no " 'possibility that some of [the subpoenaed documents] may fall outside the scope of the [crime-fraud] exception to the privilege' " (Pet. App. 6a (quoting *In re Grand Jury Proceedings (Vargas),* 723 F.2d at 1467)).[6]

Although petitioner now insists that it was error for the district court not to review the subpoenaed documents, petitioner did not argue to the district court that it had a duty to examine all of the documents that were subject to the subpoenas. In fact, petitioner took the position before the district court that the law "may not require the court to examine each and every document." Memorandum of [Company X] in Opposition to the Government's Motion to Compel the Production of Documents 96 (July 17, 1987) (Doc. 47). In light of that concession, petitioner cannot now complain that the district court erred when it failed to review each of the documents falling within the scope of the subpoenas.

In any event, the district court conducted the functional equivalent of an in camera review of the subpoenaed documents. The district court examined each of the categories

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[6] For that reason, *United States* v. *Zolin,* 809 F.2d 1411 (9th Cir. 1987), cert. granted, No. 88-40 (Oct. 17, 1988), cited by petitioner (Pet. 11-12, 14-15), is inapposite. In that case, the Ninth Circuit held that a prima facie case for the invocation of the crime-fraud exception to the attorney-client privilege can be established only by independent evidence. In our view, that absolute rule is wrong because, among other reasons, it ignores the alternative of in camera inspection. See 88-40 U.S. Br. 40-49. *Zolin,* however, does not present the question whether a district court can ever find the crime-fraud exception satisfied without conducting an in camera examination of the subpoenaed documents. Accordingly, the Court's disposition of *Zolin* will have no bearing on the issue petitioner presents.

of specific documents demanded by the subpoenas (each category related to specific subjects within certain time periods). The court then compared each of those requests with the government's detailed in camera submission before finding that each of the "documents sought in the subpoenas * * * bear[s] a reasonable relationship to the crime and frauds described in the *in camera* declaration" (Pet. App. 12a).[7] The court of appeals confirmed that finding, making clear that "the scope of the subpoenas and the *prima facie* evidence of attorney involvement in the alleged crime and fraud satisfy us that the documents subpoenaed fall within the exception to the attorney-client privilege and need not be individually examined" (*id.* at 6a).

In sum, the procedural issue petitioner seeks to present now, without ever raising that point before the district court, has not divided the courts of appeals. Moreover, petitioner offers no basis for questioning the conclusion of both the district court and the court of appeals, based on the extensive evidentiary record, that each of the subpoenaed documents fell within the crime-fraud exception.[8] Accordingly, that aspect of the court of appeals' decision merits no further review.

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[7] See also Sealed Findings at 3 ¶ 5, 7 ¶ 6, 8 ¶ 1, 9 ¶ 2, 10 ¶¶ 5-6, *In re Grand Jury Proceedings: [Company X, Law Firm Y]*, No. 87-10069A (D. Kan. Aug. 17, 1987) (Doc. 57).

[8] Again, petitioner chastises the court of appeals for "ignor[ing] the distinction between documents created for the purpose of furthering a crime and those created for the legitimate purpose of defending a client against allegations of past wrongdoing" (Pet. 13). For the reason mentioned above (see note 5, *supra*), that assertion is groundless.

Moreover, petitioner's suggestion that the Court should grant certiorari in this case to give "guidance" (Pet. 13-16) to the lower courts is without merit. Both the district court and the court of appeals fol-

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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FEBRUARY 1989

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lowed settled law and procedures governing the application of the crime-fraud exception to the attorney-client and work product privileges. Those principles and matters of practice, which stem from this Court's decision in *Clark* v. *United States*, 289 U.S. 1 (1933), have neither divided the lower courts nor proved unmanageable. Thus, petitioner has failed to show that the lower courts need guidance in this area in general, or that the decision in this case reflects any such need.

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